

SEP 23 2003



UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF TEXAS

Michael N. Milby, Clerk of Court

IN RE ENRON CORPORATION Securities, §  
Derivative & "ERISA" Litigation § MDL Docket No. 1446  
§

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MARK NEWBY, et al., §  
§  
Plaintiffs, §  
vs. §  
§ Civil Action No. H-01-3624  
ENRON CORPORATION., et al., § And Consolidated Cases  
§  
Defendants. §

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PAMELA M. TITTLE, on behalf of herself §  
and a class of persons similarly situated, et al., §  
§  
Plaintiffs, §  
vs. §  
§ Civil Action No. H-01-3913  
ENRON CORPORATION, an Oregon § And Consolidated Cases  
Corporation, et al., §  
§  
Defendants. §  
§

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IN THE UNITED STATES BANKRUPTCY COURT  
FOR THE SOUTHERN DISTRICT OF NEW YORK

In re: §  
ENRON CORP. ET AL., §  
§ CASE NO. 01-16034 (AJG)  
Debtors. §  
§ Jointly Administered  
§

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MOTION OF THE FINANCIAL INSTITUTIONS TO ADD  
CERTAIN PLAINTIFFS TO THE COURT-ORDERED MEDIATION

1678

Bank of America Corp., Barclays PLC, Canadian Imperial Bank of Commerce, Citigroup Inc., Credit Suisse First Boston LLC, Deutsche Bank AG, Goldman, Sachs & Co., J.P. Morgan Chase & Co., Lehman Brothers Inc. and Merrill Lynch & Co., Inc. (collectively, the “Financial Institutions”) respectfully submit this motion to add certain parties before these Courts to the Court-ordered mediation, which is scheduled to occur before Judge Conner on September 29-30 and October 29-31, 2003.

At the May 28, 2003 hearing, these Courts jointly ordered “[a]ll plaintiffs, all the financial institutions and the debtors” to Court-ordered mediation. (Tr. of May 28, 2003, at 3.) In doing so, the Courts observed that there may be additional cases and additional parties that should be added to the mediation “at some future time”. (*Id.* at 3, 5.) The Financial Institutions respectfully submit that the mediation would be more likely to achieve its main goal of global resolution of the Enron litigation if two categories of additional plaintiffs are added to the mediation as soon as possible.

I. CERTAIN ADDITIONAL PLAINTIFFS IN FEDERAL CASES SHOULD BE ADDED TO THE MEDIATION.

There are four federal cases involving certain of the Financial Institutions that have been transferred by the Multi-District Litigation Panel (MDL 1446), or removed, to the Southern District of Texas and coordinated or consolidated with Newby, but are not yet formally part of the mediation. See Goode v. Citigroup, Inc., No. H-02-5628 (S.D. Tex.) (transferred by the MDL Panel on Sept. 25, 2002, and consolidated with Newby on Nov. 6, 2002); CalPERS v. Banc of Am. Sec. LLC, No. H-03-3481 (S.D. Tex.) (transferred by the MDL Panel on Aug. 5, 2003, and coordinated with Newby on Sept. 16, 2003); Okomo v. Banc of Am. Sec. LLC, No. H-03-3508 (S.D. Tex.) (transferred by the MDL Panel on Aug. 13, 2003, and coordinated with Newby on Sept. 16, 2003); DK Acquisition Partners, L.P. v. J.P. Morgan Chase & Co., H-03-3393 (S.D. Tex.) (removed to the S.D. Tex., and coordinated with

Newby on Sept. 18, 2003).<sup>1</sup> Similarly, at least six other federal cases are currently being considered for transfer by the MDL Panel. See Unicredito Italiano SpA v. JP Morgan Chase Bank, No. 02 CV 5328 (S.D.N.Y.) (conditionally transferred to the S.D. Tex.); Vanguard Balanced Index Fund v. Citibank, N.A., No. 2:03-3099 (E.D. Pa.) (conditionally transferred to the S.D. Tex.); Herman v. Arthur Andersen, LLP, No. 03-CV-1115-HA (D. Or.) (conditionally transferred to the S.D. Tex.); McNett v. Arthur Andersen, LLP, No. 03-CV-1113-HA (D. Or.) (conditionally transferred to the S.D. Tex.); Transamerica Fin. Life Ins. Co. v. Merrill Lynch & Co., No. C03-107LRR (N.D. Iowa) (MDL tag-along notice for transfer to S.D. Tex. pending); McMurray v. Belfer, Adv. No. 03-03916 (Bankr. N.D. Ill.) (MDL tag-along notice for transfer to S.D. Tex. pending).<sup>2</sup>

Because the mediation order applies to “Plaintiffs in the cases that comprise MDL 1446” (June 16, 2003 Am. Order at 4), the Financial Institutions respectfully request that the Goode, CalPERS, Okomo, and DK Acquisition Partners plaintiffs be formally added to the mediation at this time. In addition, to avoid burdening the Courts with additional motions as cases are transferred and coordinated or consolidated, the Financial Institutions respectfully request an order that automatically adds plaintiffs who have sued any of the Financial Institutions to the mediation upon coordination or

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<sup>1</sup> There are three additional actions coordinated with Newby in which plaintiffs assert claims against Arthur Andersen LLP for negligent accounting and in which Andersen has brought third-party claims for contribution against certain of the Financial Institutions and Enron executives. See Al Rajhi Inv. Corp. v. Arthur Andersen, LLP v. J.P. Morgan Chase & Co., No. H-03-1219 (S.D. Tex.) (transferred to Judge Harmon on June 20, 2003, and coordinated with Newby on July 1, 2003); Richard Choucroun v. Arthur Andersen, LLP v. J.P. Morgan Chase & Co., No. H-03-3320 (transferred to the S.D. Tex. on Aug. 5, 2003, and coordinated with Newby on Aug. 29, 2003); Samson Inv. Co. v. Arthur Andersen, LLP v. J.P. Morgan Chase & Co., No. H-03-2264 (S.D. Tex.) (transferred to the S.D. Tex. on June 16, 2003, and coordinated with Newby on July 3, 2003). Because the plaintiffs in those actions have not asserted any claims against the Financial Institutions, and because Andersen and the Enron executives are not yet part of the mediation, the Financial Institutions do not believe it is necessary to add those plaintiffs to the mediation at this time. At some future point in time, it will ultimately become productive to add all of those parties (including Andersen and the individual defendants) to the mediation in order to achieve global resolution.

<sup>2</sup> The McMurray plaintiffs have already voluntarily appeared in the Court-ordered mediation by filing a written submission with Judge Conner.

consolidation of their cases with Newby pursuant to MDL 1446 or through removal of the case from Texas state court to the Southern District of Texas. Adding these additional plaintiffs to the mediation creates the best opportunity for global resolution of the Enron litigation—an essential aspect of the mediation.

## II. CERTAIN CLAIMANTS IN THE ENRON BANKRUPTCY WHO ARE PLAINTIFFS IN STATE COURT CASES SHOULD BE ADDED TO THE MEDIATION.

There are also several state court plaintiffs who are participants in the Enron bankruptcy proceedings who should be added to the mediation. See OCM Opportunities Fund III, L.P. v. Citigroup, Inc., Case No. BC283342 (Cal. Super. Ct.); Pac. Inv. Mgmt. Co. v. Citigroup, Inc., Case No. 02CC00300 (Cal. Super. Ct.) (“PIMCO”); AUSA Life Ins. Co. v. Citigroup, Inc., No. LACV 044263 (Iowa Dist. Ct.); Principal Global Investors, LLC v. Citigroup, Inc., No. CL 90942 (Iowa Dist. Ct.) (“Principal Global I”); Principal Global Investors, LLC v. J.P. Morgan Chase & Co., No. CL 93058 (Iowa Dist. Ct.) (“Principal Global II”). These plaintiffs belong in the mediation for at least two reasons.

First, these plaintiffs have sued certain of the Financial Institutions on nearly identical claims through counsel already participating in the mediation.<sup>3</sup> Specifically, the plaintiffs in those five cases are all represented by the law firm of Hennigan, Bennett and Dorman LLP—the same counsel representing the plaintiffs in Variable Annuity Life Ins. Co. v. Credit Suisse First Boston Inc., H-02-3680 (S.D. Tex.), a case consolidated with Newby and already part of the mediation. The claims asserted by these state court plaintiffs arise out of the same offerings of Osprey securities at issue in Variable Annuity, and these state court plaintiffs make nearly identical allegations to each other and to

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<sup>3</sup> The following Financial Institutions (and/or their affiliates) are named as defendants in some or all of the five state court cases listed above: Citigroup Inc., Credit Suisse First Boston LLC, Deutsche Bank AG, J.P. Morgan Chase & Co., Lehman Brothers Inc. and Merrill Lynch & Co., Inc. UBS Financial Services is also a defendant in certain of those cases and a participant in this mediation.

Variable Annuity. Indeed, counsel for plaintiffs in all six of these cases has acknowledged their similarity and has represented to this Court that there should be “maximum coordination” among them.<sup>4</sup> (Tr. of July 10, 2003 Newby Hearing at 60.)

Second, lead plaintiffs (or their representatives) in each of the five state court cases are actively participating in the Enron bankruptcy proceedings and are subject to the jurisdiction of the Bankruptcy Court. Several of those plaintiffs have filed their own proofs of claim against Enron in the Bankruptcy Court for the very same losses they now seek to recover from certain of the Financial Institutions in the state court litigations.<sup>5</sup> Additionally, those plaintiffs have collectively formed the Osprey Ad Hoc Noteholders’ Committee, which itself has made several filings in the Bankruptcy Court. See, e.g., Verified Statement of Osprey Ad Hoc Noteholders’ Committee Pursuant to Bankruptcy Rule 2019 (filed on Oct. 4, 2002); Limited Obj. of Osprey Ad Hoc Noteholders Committee to Debtors’ Mot. for Order Authorizing and Approving (A) The Sale of Certain Shares of a Non-Debtor Affiliate of Enron Corp. and Certain Non-Debtor Affiliates of Enron Corp., (B) The Assignment of Certain Contract Rights of a Non-Debtor Affiliate of Enron Corp., (C) The Assignment by Enron Corp. and Certain Non-Debtor Affiliates of Certain Rights, (D) The Assignment By a Non-Debtor Affiliate of Enron Corp. of Certain Rights, and (E) the Escrow of the Net Proceeds from Such Transactions (filed Apr. 4, 2002).

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<sup>4</sup> A seventh nearly identical case filed by Hennigan, Bennett & Dorman LLP against certain financial institutions is currently before the MDL Panel for transfer to the Southern District of Texas. See Transamerica Fin. Life Ins. Co. v. Merrill Lynch & Co., No. C03-107LRR (N.D. Iowa) (MDL tag-along notice for transfer to S.D. Tex. pending). The plaintiffs in that action should also be added to the mediation for the reasons set forth above and in Section I.

<sup>5</sup> See Proof of Claim of AEGON USA Investment Management, LLC (investment manager for all plaintiffs in AUSA) (filed Oct. 8, 2002); Proof of Claim of OCM Administrative Services II, LLC (filed Oct. 10, 2002); Proof of Claim of Principal Capital Management, LLC (now known as Principal Global Investors, LLC) (filed Oct. 8, 2002); Proof of Claim of Pacific Investment Management Company (filed on Oct. 14, 2002); Proof of Claim of Osprey Associates LLC (one of the plaintiffs in Principal Global I) (filed Oct. 14, 2002).

Due to the vast overlap between the six Hennigan cases—one of which is already part of the mediation—and the active participation of the state court plaintiffs in the Enron bankruptcy action, the Financial Institutions named in those state court cases respectfully request that the plaintiffs in the OCM, PIMCO, AUSA, Principal Global I and Principal Global II cases be added to the mediation. Adding those plaintiffs to the mediation—plaintiffs who have sued only financial institutions and whose counsel is already participating in the mediation for nearly identical claims—will make the mediation more efficient and will increase the likelihood of reaching the mediation’s primary goal of global resolution in all outstanding litigation.

#### Conclusion

For the foregoing reasons, the Financial Institutions respectfully request an order from these Courts (1) adding the plaintiffs in Goode, CalPERS, Okomo, DK Acquisition Partners, OCM, PIMCO, AUSA, Principal Global I and Principal Global II to the mediation, and (2) automatically

adding plaintiffs who have sued any of the Financial Institutions to the mediation upon coordination or consolidation of their cases with Newby pursuant to MDL 1446. A proposed order is respectfully submitted herewith.

Dated: September 23, 2003

Respectfully submitted,

A handwritten signature in black ink, reading "Richard W. Clary" with a stylized flourish at the end.

Richard W. Clary  
CRAVATH, SWAINE & MOORE LLP  
Worldwide Plaza  
825 Eighth Avenue  
New York, NY 10019-7475  
Telephone: (212) 474-1000  
Telecopier: (212) 474-3700

**AS CONTACT REPRESENTATIVE FOR THE  
FINANCIAL INSTITUTIONS IN THE MEDIATION AND  
ON BEHALF OF BANK OF AMERICA CORP.,  
BARCLAYS PLC, CANADIAN IMPERIAL BANK OF  
COMMERCE, CITIGROUP INC., CREDIT SUISSE FIRST  
BOSTON LLC, DEUTSCHE BANK AG, GOLDMAN,  
SACHS & CO., J.P. MORGAN CHASE & CO., LEHMAN  
BROTHERS INC., MERRILL LYNCH & CO., INC.**

David H. Braff  
Michael T. Tomaino, Jr.  
Jeffrey T. Scott  
Adam R. Brebner  
SULLIVAN & CROMWELL LLP  
125 Broad Street  
New York, NY 10004-2498  
Telephone: (212) 558-4000  
Telecopier: (212) 558-3588

**ATTORNEYS FOR BARCLAYS PLC**

Bruce D. Angiolillo  
Thomas C. Rice  
SIMPSON THACHER & BARTLETT LLP  
425 Lexington Avenue  
New York, NY 10017-3954  
Telephone: (212) 455-2000  
Telecopier: (212) 455-2502

John M. Callagy  
Mark I. Bane  
Steven P. Caley  
KELLEY DRYE & WARREN LLP  
101 Park Avenue  
New York, NY 10178  
Telephone: (212) 808-7800  
Telecopier: (212) 808-7897

**ATTORNEYS FOR J.P. MORGAN CHASE & CO.**

Owen C. Pell  
Lawrence Byrne  
WHITE & CASE LLP  
1155 Avenue of the Americas  
New York, NY 10036-2787  
Telephone: (212) 819-8200  
Telecopier: (212) 354-8113

**ATTORNEYS FOR DEUTSCHE BANK AG**

Mark F. Pomerantz  
Brad S. Karp  
Richard A. Rosen  
Michael E. Gertzman  
Claudia L. Hammerman  
PAUL, WEISS, RIFKIND, WHARTON & GARRISON LLP  
1285 Avenue of the Americas  
New York, NY 10019-6064  
Telephone: (212) 373-3010  
Telecopier: (212) 757-3990

**ATTORNEYS FOR CITIGROUP INC. AND ITS  
SUBSIDIARY CITIGROUP GLOBAL MARKETS INC.  
(FORMERLY KNOWN AS SALOMON SMITH BARNEY,  
INC.)**



James B. Weidner  
James Miller  
CLIFFORD CHANCE US LLP  
200 Park Avenue, Suite 5200  
New York, NY 10166-0153  
Telephone: (212) 878-8000  
Telecopier: (212) 878-8375

Robert F. Serio  
Marshall R. King  
GIBSON, DUNN & CRUTCHER LLP  
200 Park Avenue, 47th Floor  
New York, NY 10166-0193  
Telephone: (212) 351-4000  
Telecopier: (212) 351-4035

**ATTORNEYS FOR MERRILL LYNCH & CO., INC.**

Hugh R. Whiting  
JONES DAY  
Chase Tower, Suite 6500  
600 Travis Street  
Houston, Texas 77022-3008  
Telephone: (832) 239-3939  
Telecopier: (832) 239-3600

David L. Carden  
Robert C. Micheletto (not admitted in New York)  
JONES DAY  
222 East 41st Street  
New York, NY 10017-6702  
Telephone: (212) 326-3939  
Telecopier: (212) 755-7306

Brent B. Green  
Bradley C. Obermeier  
Duncan, Green, Brown, Langeness & Eckley, P.C.  
400 Locust Street, Suite 380  
Des Moines, Iowa 50309-2331  
Telephone: (515) 288-6440  
Telecopier: (515) 288-6448

**ATTORNEYS FOR LEHMAN BROTHERS INC. AND  
LEHMAN BROTHERS HOLDINGS INC.**

Max Gitter  
CLEARY GOTTlieb STEEN & HAMILTON  
One Liberty Plaza  
New York, NY 10006  
Telephone: (212) 225-2000  
Telecopier: (212) 225-3999

**ATTORNEYS FOR GOLDMAN, SACHS & CO.**

Gregory A. Markel  
Ronit Setton  
Nancy I. Ruskin  
CADWALADER, WICKERSHAM & TAFT LLP  
100 Maiden Lane  
New York, NY 10038  
Telephone: (212) 504-6000  
Telecopier: (212) 504-6666

**ATTORNEYS FOR BANK OF AMERICA CORP.**

Robert J. Ward  
MAYER, BROWN, ROWE & MAW  
1675 Broadway  
New York, NY 10019-5820  
Telephone: (212) 506-2615  
Telecopier: (212) 849-5615

**ATTORNEYS FOR CANADIAN IMPERIAL BANK OF  
COMMERCE**

Richard W. Clary  
Julie A. North  
CRAVATH, SWAINE & MOORE LLP  
Worldwide Plaza  
825 Eighth Avenue  
New York, NY 10019-7475  
Telephone: (212) 474-1000  
Telecopier: (212) 474-3700

**ATTORNEYS FOR CREDIT SUISSE FIRST BOSTON LLC**